Supreme Court, U.S.
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No. 00-379

In the Supreme Court of the United States

CONCORD BOAT CORPORATION, ET AL., *Petitioners*,

v.

BRUNSWICK CORPORATION, *Respondent*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The unanimous Eighth Circuit, applying this Court's precedents and legal principles uniformly recognized by other courts of appeals, and giving plaintiffs the benefit of all legitimate inferences from the evidence following a careful review of the voluminous record, held that Brunswick Corporation is entitled to judgment as a matter of law on competitors' claims that its above-cost price discounts on marine engines and vertical acquisitions of boatbuilders violated Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act.

The questions presented are as follows:

1. Whether the testimony of plaintiffs' sole expert witness—which provided plaintiffs' only proof of antitrust injury, causation, or damages—should have been excluded from evidence, and in any event failed to support the verdict, because, as the court of appeals held, it was "mere speculation," was "not grounded in reality," and "ignored inconvenient evidence" about the vigorously competitive engine market.

2. Whether plaintiffs' challenge to Brunswick's government-reviewed and highly publicized acquisitions of boatbuilders, filed nine years after the acquisitions were completed and purportedly harmed plaintiffs, are barred by the Clayton Act's four-year statute of limitations.

3. Whether Brunswick's voluntary, above-cost price discounts on engines were non-exclusive and did not foreclose competition, where undisputed evidence showed that boatbuilders were free to and did buy engines from other manufacturers, powerful competitors lured customers away by offering larger discounts and new products, and there were no significant barriers to entry into either the engine or boat markets.

RULES 29.6 AND 14.1 STATEMENT

Respondent is Brunswick Corporation. Brunswick has no parent company, and no publicly held company owns 10% or more of Brunswick's stock.

Petitioners are:

Independent Boat Builders, Inc.
Albermarle Boats, Inc.
Armada Manufacturing Co., Inc.
Caravelle Marine, Inc.
Campion Marine, Inc.
Century Craft Industries, Ltd. f/k/a Vanguard Indus.
Concord Boat Corp.
F.R.P. Industries, Inc. d/b/a Baha Cruisers
G.W. Invader
Galaxie Boat Works, Inc.
Harbour Ventures, Inc. d/b/a Avenger Marine
Harris Kayot, Inc.
KCS International, Inc. d/b/a Cruisers Division of KCS International, Inc. and Shamrock Division of KCS International, Inc.
Malibu Boats West
Mariah Boats, Inc.
Marine Manufacturing Corp.
Maverick Boat Co.
Mirage Manufacturing, LLC
Palm Beach Marinecraft, Inc.
Play Time Manufacturing by Ohio Marine Distr., Inc.
Powerquest Boats, Inc.
Sea Arrow Marine, Inc.
Silverton Marine Corp.
Thompson Marine Products, Inc.
Weeres Industries Corp.

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Plaintiffs, boatbuilders and their buying cooperative, purchase marine engines from respondent Brunswick Corporation and also compete with Brunswick in the boatbuilding business. Plaintiffs sued Brunswick in 1995, claiming that its offer of modest discounts on engine prices and its 1986 acquisitions of two boatbuilders violated Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. Plaintiffs' incoherent theory, put forth by their sole expert witness, Dr. Robert Hall, was that Brunswick's discounted prices were so irresistibly low that they locked in customers, yet the same prices produced a monopolistic "overcharge" on each engine plaintiffs bought. Hall also testified that, although every marine engine manufacturer integrated vertically and there are hundreds of boatbuilders and entry into the boatbuilding business is easy, Brunswick's acquisitions of two boatbuilders prevented rivals from finding buyers for their engines. Pet. App. 8a-9a, 29a, 34a-35a.

The jury returned a general verdict in favor of plaintiffs. A unanimous Eighth Circuit panel reversed based on plaintiffs' failure to adduce sufficient evidence to establish several elements of their cause of action. The court of appeals correctly analyzed the record in terms of this Court's precedents, and its decision conflicts with no ruling of any other court of appeals. It would be particularly inappropriate to grant review because the Eighth Circuit's decision rests independently on its fact-bound determination that Dr. Hall's testimony was unreliable and inadmissible. Pet. App. 30a.

STATEMENT

Without a single citation to the record or opinions below, plaintiffs' Statement serves up (at 1-10) not the facts disclosed during trial but the same litany of conclusory labels and pejorative characterizations that the Eighth Circuit firmly rejected "[a]fter a careful review of the voluminous record" and after giving plaintiffs "the benefit to which they are entitled of all legitimate inferences." Pet. App. 42a-43a. Plaintiffs' bald assertions contrast starkly with the Eighth Circuit's determination, fully supported by references to the record, that

the "combined effect" of Brunswick's discounts and acquisitions was not "in any way" "exclusionary," did not "foreclos[e] a substantial share" of the market, and caused plaintiffs no harm. Pet. App. 25a, 34a, 36a.

1. The Stern Drive and Inboard Engine Market

The market for marine engines includes many powerful competitors. Inboard engine makers include PCM, Indmar, Crusader, Volvo, Marine Power, MTU, Caterpillar, Detroit Diesel, Cummins, and recent entrant Toyota. Stern drive manufacturers during the period at issue were Outboard Marine Corporation ("OMC"), Yamaha, and Volvo—a $20 billion company six times the size of Brunswick that is the market leader in Europe. Pet. App. 3a; Brun. C.A. Br. 57 n.18. Every auto and outboard engine maker is "a potential competitor." A308-309, A690.[1] Giants Honda, Nissan, and Suzuki, for example, could readily expand into the market. A312-313, A888.

Entry into the market is relatively easy, requiring some capital but no special technology. Pet. App. 34a-35a; *id.* at 35a (Hall admitted a company like Toyota could "overcom[e] whatever entry barriers might exist"), A44, A129. Manufacturers simply "marinize" standard automobile engine blocks and fit them with a drive system. Pet. App. 4a. They sell completed engines to boatbuilders. *Ibid.* As plaintiffs rightly conceded, there are hundreds of boatbuilders and no barriers to entry into that business. A1236 n.36, A13, A798-799. Builders install engines in their boats, which they sell to boat dealers, who number in the thousands. A331, A596. Toyota, a $100 billion company with "unlimited resources," entered the market on a "vertically integrated" basis in 1998, with a boatbuilder and dealers in place. A308-310, A122-125; Pet. App. 35a.

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[1] The appendix to Brunswick's court of appeals brief is cited as "A," the addendum as "Ad.," and the trial transcript as "Tr."

2. Fluctuating Market Shares and Brunswick's Current Market Position

Fierce competition, new products, and competitive mistakes have caused engine makers' market shares to fluctuate. Hall conceded that Brunswick had earned a 75% share of the market by 1983—before it offered the challenged discounts or integrated vertically. Pet. App. 29a; A127.[2] But Brunswick's market share fell to 50% in 1988 and 1989, Hall admitted, after OMC introduced its popular new Cobra engine. Pet. App. 5a-6a; A605. OMC's success "was short lived because the company began receiving complaints that the [Cobra] was defective." Pet. App. 6a. In 1989, OMC recalled every Cobra engine resulting "in significant market share gains by Brunswick," Hall and OMC executives acknowledged. Pet. App. 6a; see Ad. 6; A76, A142, A773-776, A786, A790-792.

An industry recession halved the size of the engine market between 1988 and 1991, leading Brunswick to shut plants and lay off employees. A95-96, A148, A365. Yamaha, having entered the market at its peak and made poor "business decisions," left the market in 1994. Pet. App. 6a; A34, A79-80, A364-365, A501-502. OMC, reeling from its Cobra "fiasco" (A793) and the industry downturn, entered into a 1993 joint venture with Volvo. That agreement created a combined "5,000 plus" dealer network for engines sold under the Volvo brand and made at OMC's Tennessee plant, which has considerable excess capacity. A164, A176-177, A699, A702-703, A777-778, A794-795, A886. Volvo and OMC made missteps in their joint venture, however, which according to plaintiffs resulted in

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[2] Typical of the misrepresentations that fill the petition is plaintiffs' unsupported assertion (at 13 n.1) that Brunswick achieved a 75% market share before it offered a discount or made an acquisition because it "had exclusive patent rights" to stern drive technology. The fact is unrebutted that Brunswick had a *nonexclusive license from Volvo*, which any other rival could have obtained. A473.

"decreased consumer confidence in their products" and allowed Brunswick to "pic[k] up over 10 unearned market share points." Pet. App. 6a, 30a. By the time of trial, Brunswick's market share had once again reached approximately 75%. *Id.* at 62a.

3. Manufacturers' Price Discount Programs

Brunswick and Volvo instituted above-cost "market share discounts" in model year 1984, and OMC followed suit. Pet. App. 4a; A371-372, A257-258. Boatbuilders received a small discount if they agreed to purchase a certain proportion of their engine needs from Brunswick during a year. From 1984 to 1994, Brunswick offered a 1% discount to boatbuilders who purchased 60% of their engines from the company, a 2% discount for 70%, and a 3% discount for 80%. Pet. App. 4a. Under pressure from plaintiff Independent Boat Builders, Inc. (IBBI), the plaintiff boatbuilders' buying group, Brunswick modified the program for 1995 to 1997 so that boatbuilders could earn the 3% discount by buying 70% Brunswick and the 2% discount by buying 65% Brunswick. *Id.* at 4a, 28a. Brunswick's rivals offered much larger discounts conditioned on higher market shares. Under Volvo's program buyers could achieve a 4% discount with 90% market share, and a 5% or 6% discount with 100% market share. A372; A1229a. Brunswick refused IBBI's 1990 request that it offer a 4% discount for 100% market share. A227-228, A1229.

Beginning in 1989, Brunswick offered an additional 1-2% discount to boatbuilders that signed a two- or three-year market share agreement. Pet. App. 4a-5a. Volvo, OMC, and Yamaha all had long-term arrangements with customers. A137, A366-69, A506. While two- or three-year discounts, market share discounts, and a 1995-1997 "alliance" discount were in effect, a boatbuilder that did not make its predicted level of purchases would forgo a discount of 3-7%. A50, A54, A336, A892-893.

In three years only, Brunswick also offered boat dealers—at their request (A709)—market share rebates up to 1% or $150, in which only a small fraction of boat dealers participated. Pet.

App. 4a; Ad. 73; A62-65, A331-332, A593-599, A1232. Volvo offered larger dealer discounts over a longer period. A156-159, A594-595, A1233. Hall admitted that "anyone that sells anything to a dealer provides incentives. They won't sell them without an incentive." A137.

All of Brunswick's above-cost discount programs were "voluntary" arrangements, Dr. Hall admitted, which boatbuilders "accepted * * * because they individually got a deal from it." Pet. App. 33a. None required customers to buy *any* engines from Brunswick; all simply allowed them to obtain discounts if their purchases reached stated levels. *Id.* at 5a, 33a, 42a, 57a. Both the court of appeals and district court found that customers "were free to walk away from the discounts at any time" to accept a better deal elsewhere. *Id.* at 34a, 57a. A boatbuilder that signed an agreement, Hall testified, "the next day" could "say 'Forget the contract, I'm going a different way,' and there is no penalty for that except that you don't get the benefits of the contract." A203. No boatbuilder ever had to repay Brunswick if it failed to qualify for a discount it had received. Future discounts were simply adjusted to reflect the buyer's actual purchases. A202, A382-385, A393-394, A891.

Market share discounts were "a normal competitive tool" within the industry used by all engine makers. Pet. App. 41a. Uncontradicted evidence showed that these discounts had the legitimate "business justification" of "trying to sell [more] product." *Ibid.* They made discounts available to small boatbuilders who could not qualify for volume discounts—which is why large boatbuilders and buying groups like plaintiffs asked Brunswick to offer only volume discounts. A229-231, A250, A669, A826-827.[3] They helped improve predictability of

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[3] Belatedly realizing that volume and market share discounts provide the same incentives to buyers, plaintiffs now suggest (at 19 n.5) that volume discounts violate the antitrust laws. That is inconsistent both

demand. A311, A326-327, A654-657. And they produced "alignment"—"a seamless approach to the consumer" from engine manufacturer, boatbuilder, and dealer—by encouraging boatbuilders and dealers to focus on Brunswick's products. A438, A595-598, A639-653, A662, A708.

Brunswick customers "did not hesitate to switch" to rivals "when they offered superior discounts." Pet. App. 30a, 42a. Plaintiff Caravelle "switched from 80% Brunswick engines to 70-80% OMC" and plaintiff G.W. Invader "from 90% Brunswick to 80% OMC * * * because of OMC's favorable pricing." *Id.* at 34a; A16. Those are far from the only examples, as plaintiffs pretend. Pet. 20, 21. The record is replete with evidence that boatbuilders switched suppliers to take advantage of products or prices or to support alternative manufacturers, including huge shifts of orders to Volvo during plaintiffs' illegal boycott of Brunswick's engines and to OMC when it first introduced the Cobra. A15-20, A130-136, A236-237, A291, A306, A524, A528-529, A605, A672-675, A784, A791-792. Brunswick's discounted prices, according to plaintiffs, "were significantly above cost," so there was "ample room" for Volvo, OMC, and "new competitors such as Toyota" to "lure customers away by offering superior discounts." Pet. App. 35a.[4]

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with their self-interested plea to Brunswick to offer *only* volume discounts and with their admission below that volume discounts are "economically justified" by "economies of scale as the quantity produced increases." Pl. C.A. Br. 7-8, 33 n.37.

[4] Plaintiffs' assertion (at 6) that a rival would have to offer a 14% discount to gain half of a 100% Brunswick customer's business ignores the facts that rivals could get *all* of a boatbuilder's business by matching or slightly bettering Brunswick's discounts (as rivals frequently did); that virtually no buyer wanted to divide purchases evenly between suppliers (A166-167, A330, A423, A426-430); that any equally efficient rival--plaintiffs told the Eighth Circuit that Volvo was *more* efficient (Pl. C.A. Br. 42 n.45), contrary to their

Although boatbuilders could purchase up to 40% of their requirements from other sellers without forgoing the discount, plaintiffs opted to buy a far greater proportion of engines than needed to qualify for Brunswick's highest discount. Pet. App. 5a. Some purchased 95-100% of their engine needs from Brunswick, clearly motivated by factors other than discounts—such as product quality, service, delivery dependability, and consumer preference. Pet. App. 5a, 28a; A86, A204-207, A219, A225, A300-301, A601, A1125-1129, A1158. Brunswick's discount levels were "of no significance" to plaintiffs like Mariah Boats, which bought "90[%]-plus anyway" from Brunswick because its customers preferred Brunswick engines and Volvo was not a dependable supplier. Pet. App. 28a n.12; A86, A204-207, A217-219, A225, A235, A248. IBBI continued to buy more than 80% Brunswick after Brunswick cut the level for maximum market share discounts to 70%. A601.

4. The Industry's Vertical Integration

A fundamental industry shift toward selling a boat and motor package—designed "to synthesize engine manufacturing and boat building, leading to a higher quality and less expensive product" that was easier for consumers to understand—prompted Brunswick to purchase boatbuilders Bayliner and Sea Ray (Brunswick's largest customer) in December 1986. Pet. App. 6a; A24. These acquisitions made Brunswick a major competitor of plaintiff boatbuilders, as plaintiffs often complained. Ad. 71; A26-27, A216, A476-483, A511, A722-723. Neither the Federal Trade Commission nor the Department of Justice objected to the acquisitions (A481-82, A1164-1225),

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current assertion (Pet. 7)—could easily offer a 14% discount given plaintiffs' theory that Brunswick's prices were 50% above its costs (A50-53, A65-66, A84, A90-91); and that in fact rivals gave discounts *far greater* than 14% (*e.g.*, A802, Volvo offered 21% discount).

which "were noted throughout the boating industry." Pet. App. 6a.[5]

Bayliner and Sea Ray accounted for less than 30% of stern drive purchases, Hall admitted. A68. Brunswick's rivals could freely compete for the remaining 70% of the market and acquire or expand captive boat companies of their own. After Brunswick's acquisitions, OMC bought 5 (later 17) boatbuilders, including Brunswick's third largest customer, and "br[ought] up the production of our captive boat companies" to make up for the loss of Bayliner's business. A25, A485, A734-735, A758, A779-781. Volvo bought a $100 million stake in Brunswick's second largest customer, and after 1993 also had access to OMC's many captive boatbuilders. A409, A491, A499, A816, A932.

5. Competition in the Market

Undisputed evidence showed that rivals competed vigorously with Brunswick beyond offering their own, deeper market share discounts and acquiring their own captive boatbuilders. Volvo constantly adjusted its prices to match or undercut Brunswick (A297, A316, A585-587, A634-635, A705), dramatically reduced prices on selected products to cherry-pick business (A665-666), and offered dealer incentives, such as cash payments and cooperative advertising, to procure sales. A319-325. Volvo's consultants devised specific plans to beat Brunswick in the marketplace. *E.g.*, A1130, A1046, A1140.

Competition was intensified by powerful buying groups like IBBI, which exert pricing pressure on manufacturers. A518, A617. Buying groups are among Brunswick's best customers, purchasing 25% of its engines and "extract[ing] significant economic concessions." A663, A1226, A337, A406a-b. IBBI

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[5] Brunswick made several other small acquisitions, which plaintiffs admitted were inconsequential to their claims. Pet. App. 6a n.4.

urged its members to buy Volvo instead of Brunswick as a "bargaining chip" to get what it wanted, and went so far as to initiate a boycott of Brunswick's engines that the district court ruled illegal. Ad. 98-99; A237-248, A253, A305, A551; Pet. App. 11a. Plaintiffs buy 15% of all engines, and could have shifted *all* that business to Volvo at the stroke of a pen. A858.

The economic effect of pressure from buyers, vigorous competition, and falling demand was that the average price of Brunswick's stern drive engines increased only modestly, from $4775 in 1986 to $4984 in 1997. Pet. App. 6a; A314-17, A356-57, A387-88. Interim price increases were in line with or below inflation indices and generally lower than price increases for engine blocks (the costliest engine component) and outboard engines. A411, A422, A574-576, A1043-1044, A1064, A1234.

6. The District Court Proceedings

Plaintiffs brought this antitrust action in 1995, alleging that Brunswick's 1986 acquisitions substantially reduced competition in the engine market in violation of Clayton Act § 7, 15 U.S.C. § 18, and that Brunswick's discounts, combined with the market power it attained through those acquisitions, unreasonably restrained trade and monopolized the market contrary to Sherman Act Sections 1 and 2, 15 U.S.C. §§ 1, 2. Pet. App. 7a. Plaintiffs' sole expert witness, Dr. Robert Hall, opined that Brunswick's above-cost discounts imposed a "tax" on boatbuilders who bought engines from other manufacturers, chaining buyers to Brunswick. Together with the 1986 acquisitions, this conduct supposedly foreclosed 78% of the boatbuilder market to rival engine makers. Pet. App. 8a-9a.

Plaintiffs' only "proof" that Brunswick had engaged in anticompetitive conduct that caused injury to plaintiffs, and their only "proof" of damages, was Hall's remarkable 50/50 market share theory. Hall postulated that in a competitive stern drive market, "Brunswick and some other firm would each maintain a 50% market share." Pet. App. 9a. Any market share above

what Hall called "the benchmark competitive level of 50 percent" (A108) necessarily derived from anticompetitive conduct and resulted in a monopolistic "overcharge" on every engine sold. A108-109, A115-116, A565.[6] This overcharge supposedly increased mechanically with each additional point of Brunswick's market share. Pet. App. 9a, 29a, 51a.

Hall's theory thus rested on the contradictory proposition that Brunswick's discounts were irresistibly attractive to plaintiffs, yet left Brunswick's prices anticompetitively high (like, plaintiffs said, a $1 discount on a $10 loaf of bread). A6, A102-108, A281, A304, A604a-b. Hall constructed his hypothetical 50/50 market using the Cournot model (Pet. App. 9a), which predicts equal market shares only when consumers do not have a preference for a particular manufacturer's products and manufacturers have the same costs and will not compete vigorously to increase their output—assumptions that do not apply here. *E.g.*, A841-842 (Volvo survey showed consumers and dealers regarded Brunswick products as superior in all respects); Tr. 1381 & Pl. C.A. Br. 42 n.45 (different costs).

The jury found for plaintiffs on all three claims, awarding $44,371,761 in damages for the period from December 1991 (four years prior to the filing of the complaint) through the date

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[6] Plaintiffs' assertion that Hall's 50/50 theory related only to damages, not liability, is contradicted by Hall's own testimony. See A115-116 ("The 50 percent is the benchmark of the absence of the anticompetitive behavior. And the indicator of the presence is a market share above 50 percent"); A108 (market share above "the benchmark competitive level of 50 percent" "signals" the improper "exercise of market power" and is necessarily "anticompetitive"); A144-145, Tr. 1356. Hall testified that the objective, scientific measure of "exclusionary acts" was Brunswick's deviation from the 50/50 competitive standard: "[i]n this market without exclusionary acts, I believe that market share would be about 50 percent." A81.

of the verdict. The district court trebled that award to $133,115,283. Pet. App. 10a, 13a.

The district court denied Brunswick's motions for judgment as a matter of law or a new trial. The court admitted it could locate "no existing case law" condemning "anything even close to the unique situation" here. Nevertheless, the district court accepted Hall's theory in full and, citing "bundling" or "tying" cases in which defendants improperly conditioned price breaks on *one* product on the purchase of *another* product, held that the market share "strings" attached to Brunswick's discounted prices constituted "the de facto equivalent of exclusive dealing." Pet. App. 59a-61a, 67a.

7. The Eighth Circuit's Decision

"After a thorough examination of the record" the Eighth Circuit (Murphy and McMillian, JJ., and Bogue, District Judge) unanimously reversed and ordered entry of judgment for Brunswick. Pet. App. 32a. Applying legal principles announced in this Court's decisions, the court of appeals first held that plaintiffs' challenge to Brunswick's acquisitions was barred by the Clayton Act's four-year statute of limitations, which nothing in this case tolled or extended. *Id.* at 13a-24a. Turning to plaintiffs' Sherman Act claims, the court held that the testimony of Dr. Hall, which supplied plaintiffs' sole theory of antitrust injury, causation, and damages, should never have been admitted under this Court's recent decisions delineating standards for gauging the reliability of expert testimony, because his opinion did not "fit" the facts, interpreted in the light most favorable to plaintiffs, and depended on a defective model of a hypothetical market that was inconsistent with the record. *Id.* at 26a-31a. Plaintiffs' remaining evidence failed to show that Brunswick's conduct was exclusionary, foreclosed the market to rivals, or caused harm to plaintiffs. *Id.* at 32a-42a. "Even considering the erroneously admitted testimony of Dr. Hall," the court of

appeals found that plaintiffs had not supplied a sufficient evidentiary basis to support the verdict. Pet. App. 42a.

The full court of appeals denied plaintiffs' petition for rehearing *en banc* without a dissenting vote. Pet. App. 85a.

REASONS FOR DENYING THE PETITION

I. The Eighth Circuit's Decision Applies Settled Law To The Facts Viewed In The Light Most Favorable To Plaintiffs And Does Not Conflict With Decisions Of This Court Or Any Other Circuit.

The court of appeals applied the correct standard of review to the district court's denial of Brunswick's motion for judgment as a matter of law. Applying principles reiterated in *Reeves* v. *Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, 2109-2110 (2000), the Eighth Circuit recognized that Fed. R. Civ. P. 50(a)(1) controlled, granted plaintiffs "the benefit of all reasonable inferences," "resolved all conflicts in the evidence in [plaintiffs'] favor," and did not "weig[h] the credibility of the witnesses." Pet. App. 15a, 22a, 42a. Applying these standards, and "[a]fter a careful review of the voluminous record," the court unanimously concluded that the evidence allowed "but one reasonable conclusion": that plaintiffs "did not offer sufficient evidence to enable a jury to determine that Brunswick's market share discount programs and acquisitions were anticompetitive." *Id.* at 15a, 42a-43a. Plaintiffs' repeated assertion that the court of appeals "usurp[ed] the role of factfinder" (Pet. 23) is completely at odds with the court's indisputably correct statement of the standard of review. It also disregards the court's reliance on testimony of plaintiffs and their own expert witness, documents created by plaintiffs and independent third parties like Volvo (most introduced into evidence by plaintiffs), and other uncontested evidence. Moreover, this Court does not grant certiorari "when the asserted error consists of erroneous factual findings." Sup. Ct. Rule 10.

The court of appeals conscientiously applied legal principles announced in this Court's most recent decisions, discussing the very cases that plaintiffs assert require a different result. In holding that plaintiffs' challenge to Brunswick's acquisitions was barred by the statute of limitations, the court of appeals carefully analyzed the teachings of *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179 (1997), *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223 (1975), *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971), and *United States* v. *E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957). The court of appeals faithfully applied *Weisgram* v. *Marley Co.*, 120 S. Ct. 1011 (2000), *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137 (1999), *General Elec. Co.* v. *Joiner*, 522 U.S. 136 (1997), and *Daubert* v. *Merrell Dow Pharm.*, 509 U.S. 579 (1993), in concluding that Dr. Hall's expert testimony should have been excluded from evidence. And it discussed and applied a host of this Court's decisions, including *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), *Eastman Kodak Co.* v. *Image Tech. Servs.*, 504 U.S. 451 (1992), *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Jefferson Parish Hosp. Dist.* v. *Hyde*, 466 U.S. 2 (1984), in determining that plaintiffs had not shown Brunswick's above-cost price discounts to be anticompetitive.[7] In light of this Court's recent decisions in each of these areas, granting certiorari at the urging of Brunswick's boatbuilder competitors would serve no practical purpose. Nor does this Court review cases where the asserted error is merely "the misapplication of a properly stated rule of law." Sup. Ct. Rule 10.

The Eighth Circuit's decision does not conflict with any ruling of another court of appeals. As the district court observed,

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[7] Having held that plaintiffs' case failed for these other reasons, the Eighth Circuit did not address whether Brunswick had monopoly power. Plaintiffs' third Question Presented and argument at Pet. 22-23 therefore address an issue neither discussed nor decided below.

there is "no existing case law" that condemns "anything even close to the unique situation" here. Pet. App. 67a. To the contrary, the Eighth Circuit cited decisions of courts of appeals around the country for the legal principles it relied upon and did not express disagreement with *any* ruling from another jurisdiction. There is no reason to believe that any other court of appeals would have decided this "unique" case differently.

Review would be particularly inappropriate here because *there are multiple, independently dispositive grounds for the court of appeals' ruling*. Dr. Hall's specious testimony was inadmissible, and, because it provided the *sole* evidence of injury, causation, and damages, its exclusion required judgment for Brunswick on all claims. Pet. App. 24a-31a; see Pet. 13 (conceding that this ruling "was an independent basis" for the decision). The court of appeals *also* held that, even if Hall's testimony were considered, it provided no basis for the judgment. Pet. App. 42a. *In addition*, it carefully considered plaintiffs' other evidence and found it could not support the verdict. *Id.* at 31a-42a. Beyond this, plaintiffs' 1995 challenge to Brunswick's 1986 acquisitions of boatbuilders was filed many years after the expiration of the four-year statute of limitations. *Id.* at 16a-22a. The petition gives no cause to believe *any* of these alternative, fact-bound rulings was incorrect.

II. The Eighth Circuit Correctly Applied Standards Established By This Court When It Held That Plaintiffs' Expert Testimony Should Have Been Excluded And Does Not Support The Verdict.

Plaintiffs' expert, Dr. Hall, provided plaintiffs' "key evidence to support their theories of liability and causation." Pet. App. 25a. The court of appeals properly held that Dr. Hall's testimony was "mere speculation" and should not have been admitted because it failed to incorporate "relevant circumstances" into his "analysis related to antitrust liability," "construct[ed] a hypothetical market which was not grounded in the economic reality of

the stern drive engine market," "ignored inconvenient evidence," and "failed to account for market events that both sides agreed were not related to any anticompetitive conduct." *Id.* at 28a-31a. Indeed, "[e]ven considering the erroneously admitted evidence," the court held, Hall failed to supply a legally sufficient basis for the verdict. *Id.* at 42a. In reaching these case-specific conclusions, and holding that plaintiffs "did not establish antitrust injury or causation" (*ibid.*), the Eighth Circuit explicitly followed this Court's *Weisgram*, *Kumho Tire*, *General Electric* v. *Joiner*, and *Daubert* decisions and applied Federal Rule of Evidence 702's "exacting standards of reliability" for expert testimony. *Weisgram*, 120 S. Ct. at 1021. Plaintiffs cite no contrary authority and provide no plausible reason why this Court should revisit the fact-bound question of the admissibility of expert testimony in this unique case.

Review is particularly unnecessary because a pending amendment to Rule 702, which specifies that expert testimony must be "based upon sufficient facts or data" and be "the product of reliable principles and methods * * * *applied* * * * *reliably to the facts of the case*," will further clarify admissibility standards for the future. Proposed Fed. R. Evid. 702, 192 F.R.D. 398, 418 (2000) (emphasis added). That proposed rule, which implements *Daubert* and its progeny (*ibid.*, Comm. Note), makes clear that an expert's opinion that does not "apply reliably to"—that is, "fit"—the record facts is not admissible. See *id.* at 421, Comm. Note ("Rule 702 simply requires that * * * the testimony 'fit' the facts of the case"). The Eighth Circuit no more "badly misconstrue[d] this Court's precedents" (Pet. 27) than did the Rules Committee. Just as this Court instructed in *Kumho Tire*, the court of appeals "'scrutinize[d]' whether the 'principles and methods' employed by [Dr. Hall] 'have been properly applied to the facts of the case.'" 526 U.S. at 157. And just as in *Joiner*, it

found that there was "too great an analytical gap between the data and the opinion proffered." 522 U.S. at 146.[8]

Hall used a model to establish liability and damages that "was not grounded in the economic reality of the stern drive engine market," given facts that were undisputed, admitted by plaintiffs' witnesses or established by plaintiffs' own documentary evidence. Pet. App. 28a-31a. Hall's extraordinary theory was that, in a competitive engine market, Brunswick and one other competitor "would each maintain a 50% market share." *Id.* at 9a. According to Hall, any increase in Brunswick's market share above "the benchmark competitive level of 50 percent" (A108) was "evidence of anticompetitive conduct." Pet. App. 9a. Hall thus viewed a 50/50 market division as an affirmative goal of antitrust law and treated Brunswick's success in breaking out of a lockstep duopoly as proof of its anticompetitive conduct. In addition, Hall theorized, as the sole basis for his damages calculation, that Brunswick overcharged on each engine sold whenever Brunswick had more than a 50%

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[8] Plaintiffs incorrectly assert (at 29) that there is a circuit split as to whether expert testimony is inadmissible if it does not fit the facts. Three of the cited cases (*Mitchell*, *L.E. Cooke*, and *Kennedy*) predate *Kumho Tire*, which firmly established this "fit" requirement. In *McLean* v. *988011 Ontario, Ltd.*, 2000 WL 1199093, at *3 (6th Cir. 2000), the court recognized that an "expert's opinion * * * must find some support * * * in the record"; it merely held that testimony with support in the record should not have been excluded just because it differed from a government agency's conclusions. In none of the other cases plaintiffs cite, *Smith* v. *Ford Motor Co.*, 215 F.3d 713 (7th Cir. 2000), *Walker* v. *Soo Line R.R.*, 208 F.3d 581 (7th Cir. 2000), and *Gussack Realty Co.* v. *Xerox Corp.*, 2000 WL 1191813 (2d Cir. 2000), was the court confronted with an opinion, like Hall's, that in both its methodology and conclusions directly contradicted uncontroverted record evidence. Plaintiffs identify no case admitting testimony like Hall's that overlooks and is inconsistent with facts critical to the outcome of the case.

market share. *Id.* at 29a. That overcharge "was not affected by the actual price" Brunswick charged but simply increased in tandem with Brunswick's market share. *Ibid.*; A108-109, A115-116, A565.

Hall's hypothetical 50/50 market relies on a theoretical construct—the Cournot model—that has *never* been applied in a reported antitrust case. Pet. App. 28a n.11. Dr. Hall admitted that he used the Cournot model to predict the 50/50 market division by assuming that each product was undifferentiated and fungible—that consumers had no preference for one manufacturer's engines over another's—and that manufacturers had the same costs and accepted their rivals' market shares as given rather than competing for market share. *Id.* at 9a, 28a-29a; A113-114. Hall's assumptions do not "fit" the "specific facts" showing the fiercely competitive market for differentiated stern drive engines. Pet. App. 27a-28a.

For example, Hall assumed that Brunswick could achieve no more than a 50 percent market share through fair competition, though Hall *admitted* that Brunswick "had approximately 75 percent of the market share in sterndrive engines" *before* any of the alleged anticompetitive conduct occurred. A127-128; see also A256, A753; Pet. App. 29a. Hall's formula automatically attributed market share shifts to anticompetitive conduct by Brunswick despite unchallenged evidence that those shifts were caused by internal problems of Brunswick's rivals—including the recall by OMC of every Cobra engine and problems with the OMC/Volvo merger that plaintiffs admitted "alone increased Brunswick's market share by as much as 10%"—and therefore failed to disaggregate the effects of lawful and allegedly unlawful conduct. Pet. App. 29a-30a. Hall's testimony that plaintiffs could not switch business from Brunswick to competitors because Brunswick's discount program imposed a "tax" on engines bought from rivals ignored the uncontroverted facts that Brunswick's rivals all offered their own discounts and "that the boat

builders did not hesitate to switch to OMC and Volvo when they offered superior discounts." Pet. App. 30a.

In addition, Hall's view that Brunswick charged supra-competitive prices for its engines cannot be reconciled with plaintiffs' evidence that they purchased *more* engines from Brunswick than necessary to qualify for the maximum discount. Pet. App. 28a. Hall's theory clashed with the undisputed fact that plaintiffs and their powerful buying group successfully pressured Brunswick to withdraw a planned increase in its discount criteria. *Ibid.* And Hall's view that stern drive engines were undifferentiated cannot be reconciled with plaintiffs' own evidence showing that consumers and dealers regarded Brunswick products and support as superior, that manufacturers' costs differed, and that new products like OMC's Cobra could quickly garner significant market share. Tr. 1371, 1381; A841-842; Pet. App. 29a-30a. Hall impermissibly "ignored" all this "inconvenient evidence" (and more), relying on his artificial model as a substitute for "'market facts.'" Pet. App. 28a, 30a, quoting *Brooke Group*, 509 U.S. at 242.

Because Hall's opinion testimony did not fit the facts, the court of appeals properly concluded that his testimony was "speculative," "contribute[d] 'nothing to a legally sufficient evidentiary basis'" for decisionmaking, and should not have been admitted. Pet. App. 30a-31a, quoting *Weisgram*, 120 S. Ct. at 1014. That conclusion necessarily followed from this Court's recent series of decisions regarding expert testimony. The "excision" of Hall's testimony left "insufficient evidence" to support the jury's verdict, making entry of judgment for Brunswick appropriate. *Weisgram*, 120 S. Ct. at 1022; Pet. App. 31a-42a. There is no reason to revisit the court of appeals' application of settled legal principles to the particular facts here.

Even apart from *Daubert* issues, the court of appeals correctly held (Pet. App. 42a)—in an alternative holding that plaintiffs fail to mention—that the defects in Hall's theory required rever-

sal as a matter of law even if the testimony was not excluded. A theory of antitrust liability and damages must have record support and be reasonable to support a jury verdict. *Brooke Group*, 509 U.S. at 242-243 (expert opinion "cannot support" a jury verdict if "record facts contradict" it or render it "unreasonable"); *Eastman Kodak*, 504 U.S. at 468-469 ("If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor"); *Matsushita*, 475 U.S. at 588-597. As the court of appeals determined, Hall's theory was rendered "unreasonable" by "indisputable record facts." Pet. App. 30a-31a, quoting *Brooke Group*, 509 U.S. at 242.

Hall's theory is "economically senseless." It would constrain procompetitive behavior and contravene the fundamental purpose of the antitrust laws. The only way the engine market could maintain a stable 50/50 market division would be if competitors pulled their punches, accepted their rivals' market shares as given, and declined to grow their own market shares by taking advantage of the mistakes of rivals. If such equal market shares were the litmus test of antitrust compliance, as Hall opined, no manufacturer with a large market share would dare lower its price or improve its product for fear of increasing its market share and facing antitrust claims and ruinous treble damages. Such a chilling effect would badly disserve consumer welfare. Indeed, if two companies maintained a constant 50/50 market division, antitrust enforcers would suspect collusion.

The Eighth Circuit's case-specific determination that Hall's testimony was inadmissible and did not support the verdict is in accord with this Court's decisions, is not in conflict with the ruling of any court of appeals, is certainly correct, and does not warrant this Court's review. This defect in plaintiffs' case is independently dispositive, and warrants denial of certiorari.

III. The Eighth Circuit Correctly Applied Settled Law When It Held That Plaintiffs' Challenge To Brunswick's Boatbuilder Acquisitions Is Time Barred.

Treble damage actions, based on any statutory theory, are "forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b (Clayton Act § 4B). Brunswick purchased Bayliner and Sea Ray in December 1986, so plaintiffs had to file their antitrust challenge to those acquisitions by December 1990. Pet. App. 16a-17a. Yet they did not bring suit until December 1995—*nine years after the acquisitions*. The court of appeals accordingly held that plaintiffs' Section 7 claim was time barred. *Id.* at 22a.[9]

Plaintiffs pretend that this routine application of the statute of limitations conflicts with this Court's precedents. Pet. 14-16. To the contrary, the Eighth Circuit's decision applied this Court's long-standing rule that an antitrust claim "accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971); see also *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 188 (1997). It fully accords, moreover, with the application of that rule by other courts of appeals. See, *e.g.*, *DXS, Inc.* v. *Siemens Med. Sys., Inc.*, 100 F.3d 462, 467-468 (6th Cir. 1996); *Kaw Valley Elec. Coop.* v. *Kansas Elec. Coop.*, 872 F.2d 931, 933 n.5 (10th Cir. 1989); *Brunswick Corp.* v. *Riegel Textile Corp.*, 752 F.2d 261, 271 (7th Cir. 1984).

In a clear admission that the acquisitions injured them (if at all) *in 1986*, plaintiffs introduced a specific calculation of their damages dating back to the time of the acquisition. Pet. App. 18a. In addition, IBBI advised its members in January 1990 that "Brunswick's practices [were] 'in violation of the Sherman Anti-

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[9] The district court rejected plaintiffs' equitable claims addressed to Brunswick's acquisitions due to their "long and unjustified delay" in filing suit. Ad. 81. Plaintiffs did not appeal that ruling.

Trust Act.'" *Ibid.*; A809. Unrebutted record evidence showed that Brunswick's government-reviewed "purchases of Bayliner and Sea Ray were public information at the time of acquisition and were well known throughout the boat manufacturing industry." Pet. App. 18a, citing Tr. 1929. It is therefore plain, as the court of appeals held, that any injury accrued well before December 1991—four years before plaintiffs filed suit—and that plaintiffs were fully aware of that injury. Pet. App. 18a-19a. These fact-bound determinations plainly do not merit review.

Plaintiffs seek to justify the extraordinary nine-year delay in filing this lawsuit by contending that their damages were too speculative to be ascertained during the four years after the acquisitions. Pet. 16 n.3. The Eighth Circuit recognized that, under *Zenith*, the statute of limitations is tolled where "damages are only speculative during the limitations period." Pet. App. 18a. It found, however, that plaintiffs' damages were *not* speculative, and that in fact plaintiffs had "provided the jury with damage calculations for each year beginning in 1986." *Ibid.*; A1053-61, A1068-76. Given plaintiffs' damages formula, damages were as "easily calculable" in 1986 as at trial. Pet. App. 18a. Plaintiffs' supposed damages "have always been specific and calculable" (*Klehr*, 521 U.S. at 191), leaving them no excuse for untimely filing.[10]

Plaintiffs fare no better with their claim that Brunswick's "holding and use" of Bayliner's and Sea Ray's assets constituted a "continuing violation" that nullifies application of the statute of limitations. Pet. 14-15. The court of appeals recognized that "'holding as well as obtaining assets'" may violate Section 7 in certain circumstances, but also that the statute of limitations

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[10] Plaintiffs assert that the combined effect of acquisitions and discounts took effect only in 1991. Pet. 16 n.3. But Brunswick's discount programs were in place in 1984, and plaintiffs gave the jury a damages calculation beginning in 1986. Pet. App. 4a, 18a.

forbids "'continual challenge under Section 7.'" Pet. App. 17a, 19a (quoting *Midwestern Mach., Inc.* v. *Northwest Airlines*, 167 F.3d 439, 442 n.3, 443 (8th Cir. 1999)). The record here, the court explained, contains no evidence "that Brunswick was holding or using Bayliner and Sea Ray differently than when it originally acquired them." Pet. App. 22a. The record is also devoid of any "separate new overt" violation during the limitations period, precluding application of the "continuing violation" exception. *Id.* at 20a, citing *Klehr*, 521 U.S. at 189.

Neither *United States* v. *E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957), nor *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223 (1975), conflicts with this ruling, as plaintiffs claim. Pet. 14-15. In neither case did a private plaintiff attempt to recover treble damages and in neither case did this Court consider or discuss the statute of limitations. *Du Pont* involved a claim for equitable relief by the government. *Continental Baking* involved the government's efforts to enforce equitable consent decrees. This Court has held that "consummated transactions" are protected "from belated attacks by private parties" like plaintiffs "when it would not be too late for the Government to vindicate the public interest." *California* v. *American Stores Co.*, 495 U.S. 271, 296 (1990). Plaintiffs have not identified a single case in which a court has permitted a private plaintiff seeking treble damages to challenge a publicly announced merger completed more than four years before suit was filed.

Plaintiffs alternatively suggest that the limitations period restarts each time Brunswick sells an engine at a "supra-competitive" price, causing "antitrust injury." Pet. 16. But post-acquisition engine sales, the court of appeals noted, are simply the "'unabated inertial consequences'" of the acquisition, not new "overt acts" that "'restart the limitations period.'" Pet. App. 20a, quoting *DXS, Inc.* v. *Siemens Med. Sys., Inc.*, 100 F.3d 462, 467-468 (6th Cir. 1996); see also *Grand Rapids Plastics, Inc.* v. *Lakian*, 188 F.3d 401, 406 (6th Cir. 1999) (sales were not "new

and independent" acts). They are nothing like sales at prices fixed pursuant to a price-fixing conspiracy, where each price-fixed sale is a new unlawful action implementing the conspiracy. See *Zenith Radio*, 401 U.S. at 338 (the "continuing violation" exception applies to a "continuing conspiracy"); 1 C. CORMAN, LIMITATION OF ACTIONS § 6.5.5.2 (1991). Nor are they anything like the specific renewed refusals to deal that some courts have held may retrigger the statute of limitations. See Pet. 17, citing *Bell* v. *Dow Chem. Co.*, 847 F.2d 1179 (5th Cir. 1988), and *Poster Exchange, Inc.* v. *National Screen Serv. Corp.*, 517 F.2d 117 (5th Cir. 1975); see also 2 P. AREEDA & H. HOVENKAMP, ANTITRUST LAW 148-149 (rev. ed. 1995). Plaintiffs cite *no* case in which a court has held that a combined entity's sales restart the statute of limitations to challenge a merger.[11]

Plaintiffs' final contention (at 17 n.4)—that the only effect of Section 4B is to limit their *damages* to the four years before suit—ignores the statutory command that a damages "*action*" is "forever *barred* unless commenced within four years" of accrual. 15 U.S.C. § 15b (emphasis added). Plaintiffs' transformation of Section 4B from a limitation on "actions" to a limitation on damages would undermine the purposes served by statutes of limitations. Litigants could sit on their rights, await a four-year period that maximizes damages, then sue many years after a publicly announced acquisition—just as plaintiffs did here. See *Klehr*, 521 U.S. at 187 (rejecting accrual rule that would conflict with "a basic objective—repose—that underlies limitations periods").

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[11] *Twin City Sportsservice, Inc.* v. *Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 1975), and *LaSalvia* v. *United Dairymen*, 804 F.2d 1113, 1119 (9th Cir. 1986), do not conflict with the court of appeals' decision. Pet. 17. Both involved Sherman Act challenges to exclusive contracts, not Clayton Act challenges to a completed, public merger.

In fact, as the court of appeals recognized, the effect of *each* of plaintiffs' arguments is that there would be "no statute of limitations" at all for Section 7 actions; a prospective plaintiff could sue "at any time." Pet. App. 20a. Plaintiffs' "continuing violation" theory would completely swallow the accrual rule established in *Zenith* and *Klehr*. That result would be "at odds with the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella* v. *Wood*, 120 S. Ct. 1075, 1082 (2000) (citing the "Clayton Act's injury-focused accrual rule").

Plaintiffs offer no reason why this Court should review the court of appeals' straightforward application of the Clayton Act statute of limitations. The Eighth Circuit conscientiously followed this Court's decisions, and its fact-bound ruling in no way conflicts with any decision of another court of appeals.

IV. The Eighth Circuit Correctly Applied Settled Law When It Held That The Evidence Did Not Establish That Brunswick's Discounts Were Anticompetitive.

Plaintiffs contend (at 23-26 and Question Presented 4) that the court of appeals adopted a rule of legality for above-cost price discounts that "means that above-cost pricing amounts to a free pass for a monopolist to engage in any price-related exclusionary conduct." Pet. 24. The court of appeals did no such thing.

To be sure, the Eighth Circuit properly recognized "the general rule that above cost discounting is not anticompetitive." Pet. App. 39a. As this Court has often explained, "cutting prices in order to increase business often is the very essence of competition" (*Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993)) and is "the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986). See *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104,

116 (1986) ("it is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition"); *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 340-341 (1990) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition"); *State Oil Co.* v. *Khan*, 522 U.S. 3, 15 (1997).

Courts of appeals also uniformly recognize that above-cost discounting is pro-competitive, is beneficial to consumers, and generally does not violate the antitrust laws. See, *e.g.*, *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 235 (1st Cir. 1983) (price cuts are "procompetitive" and "perhaps the most desirable activity (from an antitrust perspective) that can take place in a concentrated industry") (Breyer, J.); *Kentmaster Mfg. Co.* v. *Jarvis Prods. Corp.*, 146 F.3d 691, 695 (9th Cir. 1998) (for a monopolist "[t]o beat a competitor's prices" to "enlarg[e] its market share" is "normal business" and "a boon to customers"); *Ball Mem. Hosp.* v. *Mutual Hosp. Ins. Co.*, 784 F.2d 1325, 1339 (7th Cir. 1986). Plaintiffs have not cited one decision of this Court or any court of appeals that conflicts with the Eighth Circuit's view that above-cost discounting generally does not offend the antitrust laws.

By no means, however—as plaintiffs pretend (Pet. 24-25)—did the Eighth Circuit suggest that above-cost pricing excuses a firm that engages in an independent anticompetitive restraint such as price fixing, tying, or refusal to deal. To the contrary, the court acknowledged that "other factors" may show that discount pricing is anticompetitive. Pet. App. 39a. The court thus carefully distinguished cases involving unlawful "bundling or tying," like *SmithKline Corp.* v. *Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir. 1978), where discounts on one product are predicated on the purchase of a second product. Because there are "no allegations" here that "'two separate product markets have been linked'" by Brunswick's discounts, the court found

those cases irrelevant. Pet. App. 40a-41a, quoting *Jefferson Parish Hosp. Dist.* v. *Hyde*, 466 U.S. 2, 21 (1984).[12]

Nor, as plaintiffs assert (at 20-21 and Question Presented 2), did the court of appeals rule that only a universal prohibition on customers dealing with rivals is unlawfully exclusionary. To the contrary, the court assumed that both "exclusive contracts" and "de facto exclusive dealing" may be unlawful in some situations. Pet. App. 33a. It found, however, that there was *nothing* exclusionary about Brunswick's discounts.

Plaintiffs, the court of appeals observed, did not have to "commit to Brunswick for any specified period" to obtain discounts, but remained "free to walk away from the discounts at any time." Pet. App. 34a. Plaintiffs "in fact switched" to rival engine suppliers many times, because rivals "offered superior discounts" or new products like the Cobra, or because plaintiffs wanted to punish Brunswick and support other suppliers (as during plaintiffs' illegal boycott of Brunswick engines). *Ibid.*; see p. 6, *supra*. The district court too found that market share agreements did not "obligat[e anyone] to purchase [Brunswick] engines" or "restric[t boatbuilders'] or dealers' ability to deal with other engine suppliers." Ad. 10-11; A203. Because the court of appeals concluded that the record "did not demonstrate that Brunswick's discount program was in any way exclusive"

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[12] Plaintiffs' claim (at 25) that the court of appeals' decision is inconsistent with *Eastman Kodak* is absurd. *Kodak* held that a defendant could not obtain summary judgment on an incomplete record in a *tying* case. 504 U.S. 451. Brunswick did not engage in tying, and the court of appeals held on the basis of a "voluminous record" that Brunswick's discounts were not exclusionary and resulted in no foreclosure. *Kodak* reaffirms that, "[b]ecause cutting prices to increase business is the very essence of competition, * * * mistaken inferences would be especially costly and would chill the very conduct the antitrust laws are designed to protect." *Id.* at 478 (internal quotations omitted).

or resulted in any rival's being "'frozen out of [the] market,'" the "universal-exclusion rule" plaintiffs would have this Court review played no role—indeed, was not even hinted at—in the court of appeals' decision. Pet. App. 34a, quoting *Jefferson Parish*, 466 U.S. at 45 (O'Connor, J., concurring).[13]

The Eighth Circuit's ruling is consistent with decisions of numerous other courts of appeals that a readily terminable agreement has no "potential to foreclose competition." *Omega Envtl., Inc.* v. *Gilbarco, Inc.*, 127 F.3d 1157, 1162-1165 (9th Cir. 1997); see, *e.g.*, *Western Parcel Express* v. *United Parcel Service*, 190 F.3d 974, 976 (9th Cir. 1999); *CDC Tech., Inc.* v. *IDEXX Labs.*, 186 F.3d 74, 80-81 (2d Cir. 1999); *U.S. Healthcare, Inc.* v. *Healthsource, Inc.*, 986 F.2d 589, 596 (1st Cir. 1993); *Roland Mach. Co.* v. *Dresser Indus.*, 749 F.2d 380, 395 (7th Cir. 1984). It accords with cases holding that the "actual behavior" of customers in switching suppliers shows they were not "effectively locked-in" by "generous" contract terms. *SMS Sys. Maint. Servs.* v. *Digital Equip. Corp.*, 188 F.3d 11, 14, 19-20 (1st Cir. 1999). And it is consonant with other circuits' rulings that ordinary business practices used throughout industry—like cutting prices to increase sales—are not anti-

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[13] These facts readily distinguish this case from *United Shoe Mach. Corp.* v. *United States*, 258 U.S. 451, 456-458 (1922), in which "drastic [contractual] provisions" "practically compel[led]" the exclusive use of United Shoe's machinery; *Anchor Serum Co.* v. *FTC*, 217 F.2d 867, 869 (7th Cir. 1954), a Clayton Act § 3 case in which plaintiffs had to buy "all their requirements" from defendant in order to use defendant's name; and *Advanced Health-Care Servs.* v. *Radford Comm. Hosp.*, 910 F.2d 139, 152 (4th Cir. 1990), another Clayton Act § 3 claim alleging that defendants agreed to deal with each other "to the exclusion of all other competitors." See Pet. 21. Another case that plaintiffs cite (at 21) as establishing a conflict, *Barr Labs.* v. *Abbott Labs.*, 978 F.2d 98, 110 n.24 (3d Cir. 1992), in fact recognized that "[a]n agreement affecting less than all purchases does not amount to true exclusive dealing."

competitive. *Barry Wright*, 724 F.2d at 235; *Houser* v. *Fox Theatres Mgt. Corp.*, 845 F.2d 1225, 1231 (3d Cir. 1988); *Equipment Distribs. Coalition* v. *FCC*, 824 F.2d 1197, 1202 (D.C. Cir. 1987); *Souza* v. *Bishop Est.*, 821 F.2d 1332, 1336 (9th Cir. 1987); *Northeastern Tel. Co.* v. *AT&T*, 651 F.2d 76, 92-93 (2d Cir. 1981). Plaintiffs cite no case rejecting these principles.

The leading antitrust treatise points out that above-cost discounts like Brunswick's that "attac[h] merely to the quantity of goods purchased, and not to exclusivity itself," lack the "competitive impact" of exclusive dealing arrangements "because any equally efficient rival can take the customer by bidding a better price and even by compensating the customer for the loss of discount from the defendant." 11 H. HOVENKAMP, ANTITRUST LAW ¶ 1807c, at 120 (1998). That is precisely what OMC and Volvo—vertically integrated companies with captive boatbuilder customers and large dealer networks—did here, offering deeper discounts than Brunswick, conditioned on a larger share of engine purchases, and using targeted efforts to cherry-pick the best engine customers. Pet. App. 5a; A372, A1229a; Brun. C.A. Br. 14. In those circumstances— and where the record demonstrates that new entry into the engine, boatbuilder and dealer markets was easy (Pet. App. 34a-35a; A1236 n.36) and that rivals had excess capacity to meet any new demand (A699, A702-703)—Brunswick obviously could not lock up buyers and foreclose competitors by offering modest 3-7% discounts. Brunswick's discount program left boatbuilders free to buy 20-30% of their needs elsewhere without losing *any* discount, and rivals could win a greater share of boatbuilders' business by undercutting Brunswick's supposed monopolistic prices or offering better products or service.

Plaintiffs' claim that the structure of Brunswick's discounts made them unlawful is flatly at odds with *Brooke Group* and with then-Judge Breyer's leading opinion in *Barry Wright*—decisions plaintiffs do not bother to discuss but that firmly reject challenges to discounts conditioned on buying more of the

product. In *Brooke Group*, "higher volume purchases entitled customers to higher discounts" from B&W, so "customers opting to [buy from B&W's rivals] would in effect be penalized." 748 F. Supp. 344, 360 (M.D.N.C. 1990). Customers "would buy exclusively from" B&W "to avoid this penalty" (plaintiffs' "tax"). *Ibid.* This Court held B&W's graduated discounts lawful, explaining that discounted, above-cost prices "do not threaten competition," "regardless of how [they] are set" or "the type of antitrust claim involved." 509 U.S. at 215-216, 223. *Barry Wright*—approved in *Matsushita*, 475 U.S. at 585 n.8, 594—rejected Sherman Act challenges to *25-30% discounts* geared to the buyer purchasing *86%* of its needs from the defendant monopolist—a larger discount than Brunswick ever offered, predicated on supplying a larger share of the customer's needs.

The articles plaintiffs cite by FTC staff attorneys are not to the contrary. Pet. 18-19. One acknowledges that the antitrust laws "normally encourage discounts," which are "not * * * usually" anticompetitive. Tom, Balto, & Averitt, *Anticompetitive Aspects of Market-Share Discounts and Other Incentives to Exclusive Dealing*, 67 Antitrust L.J. 615, 622, 634 (2000). The authors recognize that discounting is competitively benign when the contract is "for a limited period of time" (635), is "something that a competitor could * * * matc[h]" (632), a rival can "start with a foothold by serving a small part of the business * * * and then grow from that base" (619), the incentive offered is small (632), entry barriers are low (624, 633 n.52), or "there are large or sophisticated buyers" who can "thwar[t]" attempted "foreclosure" (618 n.15, 626 n.34)—all of which are true here. The authors agree, moreover, that antitrust inquiry is "very fact-specific," requiring a "court to focus on the harms and benefits of the particular challenged practice in the specific market," just as the Eighth Circuit did here. *Id.* at 635. A second article (by one of the same authors) addresses exclusivity arrangements in the context of *networks*, which are not in issue here. Balto, *Networks and Exclusivity*, 7 Geo. Mason L. Rev. 523 (1999).

That article in any event defines exclusive dealing as a requirement that a dealer not sell competitors' goods—a requirement Brunswick never imposed (526)—and concludes that terminable contracts, alternative suppliers, and low entry barriers ensure vigorous competition (553-554, 560).

Plaintiffs cite no decision condemning above-cost discounts on a single product for market share or volume—still less condemning them in a market with the features of the stern drive/inboard engine market. They supply no reason why the Eighth Circuit's fact-bound application of settled legal principles to the voluminous record in this case warrants further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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